Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ARTHUR R. ALTHOFF

and

JULIA A. ALTHOFF

Petitioners

v.

UNITED STATES

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

Arthur R. Althoff and
Julia A. Althoff, Parties Pro Se
P.O. Box 248
Sanderson, Texas 79848
Phone: (915) 345-2875

87 pp

QUESTIONS PRESENTED

This cause of action is an inverse condemnation claim to recovery "just compensation" for the regulatory taking of private property, which is a constitutional entitlement as guaranteed by the Fifth Amendment to the United States Constitution. These questions of law address this substantive issue.

1. Whether the Fifth Amendment guarantees prior landowners the right to receive just compensation when courts of competent jurisdiction decide that there was in fact a lawful and proper regulatory taking of their vested property rights by acts of the federal government.

2. Whether the right to just compensation secured by the Fifth Amendment is a substantive right and is among the principal foundations of American liberty, and it is no less fundamental than the rights secured by the First Amendment or the other amendments of the Bill of Rights.

3. In taking cases, whether there is a "final judgment on its merits" which bars subsequent litigation by the doctrine of *res judicata*, when federal courts in prior litigation decide that acts of the federal government did in fact take private property in a proper manner as authorized by law, but do not attach any liability upon the government to pay compensation and do not "actually determine" whether the deprived owners received compensation or are constitutionally entitled to receive just compensation as required by the Fifth Amendment.

4. Whether the U.S. Court of Federal Claims has exclusive subject-matter jurisdiction to hear and determine a Fifth Amendment inverse condemnation claim to recovery just compensation for a proper regulatory taking of private

property, based on the following conditions: 1) the value of the property taken exceeds $10,000; 2) a federal district court in prior litigation decides that this property was in fact properly and lawfully taken by acts of the federal government; and 3) the deprived owners received **NO** compensation for this proper regulatory taking.

5. When the federal government seeks to dismiss an inverse condemnation claim to recovery just compensation for a regulatory taking of private property, whether the court must accept as true the complaint's undisputed factual allegations, and whether the burden of proof is upon the United States to show that compensation was paid, either in the form of money damages or equitable relief.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioners are acting *pro se* without counsel, primarily because the federal government has taken nearly all property assets from them, which left them without the financial resources to hire an attorney. However, petitioners have been studying law for nearly eight years, and if this petition is granted, petitioners will conduct themselves in a professional manner, uprightly and according to law, to the best of their ability, and will support and defend the Constitution of the United States.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Petition 14

Conclusion 30

INDEX TO APPENDICES

Appendix A – Order by the United States Court of Appeals for the Federal Circuit, case no. 99-5031, filed May 14, 1999.

Appendix B – Opinion by the United States Court of Federal Claims, case no. 98-203C, filed September 23, 1998.

Appendix C – Judgment by the United States Court of Federal Claims, case no. 98-203C, filed September 23, 1998.

Appendix D – Order by the United States Court of Appeals for the Federal Circuit, case no. 99-5031, filed August 2, 1999, which denied the motion for a rehearing en banc.

Appendix E – Order by the United States Court of Federal Claims, case no. 98-203C, filed October 22, 1998, which denied plaintiffs' motion for reconsideration.

Appendix F – Order by the United States Court of Federal Claims, case no. 97-427L, filed July 1, 1997.

Appendix G – Order by the United States Court of Appeals for the Federal Circuit, case no. 97-5132, filed November 17, 1997.

Appendix H – Order and Judgment by the United States Court of Appeals for the Tenth Circuit, case no. 94-4231, filed July 24, 1995.

Appendix I – Memorandum Opinion and Order by the United States District Court for the District of New Mexico, case no. CIV 92-0157, filed March 18, 1993.

Appendix J – U.S. Small Business Administration's Certified Statement of Account, as of 4/1/93.

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Number | Page

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Fifth Amendment . . . . . *passim*

Article III 1,6

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Armstrong v. United States, 364 U.S. 40 (1960) 20

Bell v. Hood, 327 U.S. 678 (1946) 14

Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102 (1974) 24

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 23

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Chicago B. & Q. R. Co. v. City of Chicago,
166 U.S. 226 (1897) 20-22

Cleveland Bd. Of Educ. V. Loudermill,
470 U.S. 532 (1985) 19

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Conley v. Gibson, 355 U.S. 41 (1957) 26

Cromwell v. County of Sac., 94 U.S. 351 (1876) 29

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222 F.2d 622 (4th Cir. 1955) 29

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482 U.S. 304 (1987) 19,22

Gould, Inc. v. United States, 935 F.2d 1271
(Fed. Cir. 1991) 26

Hage v. United States., 35 Fed.Cl. 147 (1996) . .17,19,22,24

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657 F.2d 939 (7th Cir. 1981) 29

In re Jenson, 980 F.2d 1254 (9th Cir. 1992) 29

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480 U.S. 470 (1987) 21

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Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 21,22

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483 U.S. 825 (1987) 21

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62 F.3d 37 (1st Cir. 1995) 25

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81 F.3d 1182 (2nd Cir. 1996) 25

Oregon R.R. & N. Co. v. Fairchild, 224 U.S. 510 (1912) . 21

Papasan v. Allain, 478 U.S. 265 (1986) 26

Preseault v. ICC, 494 U.S. 1 (1960) 19

San Diego Gas & Electric Co. v. San Diego,
450 U.S. 621 (1981) 22,28,29

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464 F.2d 870 (3rd Cir. 1972) 30

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168 U.S. 1 (1897) 29

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Tabb Lakes , Ltd. v. U.S., 10 F.3d 796
(Fed. Cir. 1993) 22,23

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United States v. Clarke, 445 U.S. 253 (1980) 23

United States v. Moser, 266 U.S. 236 (1924) 29

United States v. Sherwood, 312 U.S. 584 (1941) 27

Vanhorne's Lessee v. Dorrence,
2 U.S. (2 Dall) 304 (1795) 15-17

Whitney Benefits, Inc. v. United States,
18 Cl.Ct. 394 (1989) 17

Wilkinson v. Leland, 27 U.S. (2 Pet) 627 (1829) 17

Federal Statutes and Rules

15 U.S.C. § 631(a) 2,3

15 U.S.C. § 636(a) 2,3

15 U.S.C. § 636(a)(6) 2,4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(a)(2) 2,24,25

28 U.S.C. § 1491(a)(1) 2,4,24

28 U.S.C. § 2071(a) 3

28 U.S.C. § 2072(a)&(b) 3,27

Rule 12(b)(4) of the Rules of the United States Court of Federal Claims 2,6,26,27

Other

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4436 (1981) 25,27

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIRARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Federal Circuit, case number 99-5031, appears at Appendix A, and is unpublished.

The Order and Judgment of the United States Court of Federal Claims, case number 98-203C, appears at Appendices B and C, and is also unpublished.

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on August 2, 1999, and a copy of the order denying rehearing appears at Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution states that "no person shall be. . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Article III, Section 2, Clause 1 of the United States Constitution states that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made. . . to Controversies to which the United States shall be a Party. . ."

Federal Statute 15 U.S.C. § 631(a) states that the U.S. Small Business Administration (herein referred to as "SBA"), a federal agency, "should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns to preserve free competitive enterprise, . . . and to maintain and strengthen the overall economy of the Nation."

Federal Statute 15 U.S.C. § 636(a) states that SBA "is empowered . . . to make loans [for small business concerns] . . . either directly or in cooperation with banks or other financial institutions. . ."

Federal Statute 15 U.S.C. § 636(a)(6) states that "all loans made under the subsection shall be of such sound value or so secured as reasonably to assure repayment. . ."

Federal Statute 28 U.S.C. § 1346(a)(2) states that "the district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress. . ."

Federal Statute 28 U.S.C. § 1491(a)(1) states that the "United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress. . ."

Rule 12(b)(4) of the Rules of the United States Court of Federal Claims ("RUSCFC") states that the defendant may file a motion to dismiss a case because of the plaintiff's "failure to state a claim upon which relief can be granted."

Federal Statute 28 U.S.C. § 2071(a) states that "the Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."

Federal statute 28 U.S.C. § 2072 states: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts. . . and courts of appeals." and "(b) Such **rules shall not abridge, enlarge or modify any substantive right**. . ." [Emphasis added.]

STATEMENT OF THE CASE

Petitioners have been denied the substantive right to "just compensation" as guaranteed by the Fifth Amendment for lack of jurisdiction and by the doctrine of *res judicata*. Courts in prior litigation have held that there was in fact a lawful and **proper regulatory taking** of the petitioners' private property in the State of Arizona. However, petitioners received **NO** compensation for this taking, and **NO** court of law has "actually determined" whether petitioners were compensated or are constitutionally entitled to be compensated for this governmental taking. The federal government has ignored and avoided the petitioners' substantive right to receive just compensation.

During 1989, SBA made a direct $270,000 small business loan to petitioners to expand a ceramic business in Moab, Utah, as authorized by 15 U.S.C. §§ 631(a), 636(a). To secure its loan, SBA held liens on this Utah business property, and real property located in the states of Arizona and New Mexico. Fair market value of this collateral was

over $800,000, so SBA had sufficient interest to assure repayment of the loan as authorized by 15 U.S.C. § 636(a)(6).

In 1990 after the loan was made and secured, **SBA forfeited, vacated and gave away its secured interest in the Arizona property to a third party which caused the petitioners to be divested of property rights without payment of any compensation to them, and has deprived them of economic security.** As a result, SBA destroyed their secured interest in the Arizona property which left the federal government without this interest to assure repayment of its loan, and the deprivation of this Arizona property caused the petitioners to lose income to pay on SBA's note.

In 1991, over a year after the deprivation of Arizona property, petitioners defaulted on SBA's note and SBA initiated action to foreclose on its loan. As a result of SBA's loan foreclosure, petitioners received credit towards the loan balance for the foreclosure sales of the Utah and New Mexico properties, but **NO** credit was applied to the loan balance for the Arizona property, which resulted in a deficiency judgment against the petitioners for nearly $300,000.

Pursuant to federal statute 28 U.S.C. § 1491(a)(1), the United States Court of Federal Claims (herein referred to as "Court of Federal Claims" or "trial court") has subject-matter jurisdiction over any claim against the United States founded upon the Constitution. Petitioners filed this controversy as an **inverse condemnation claim** for $400,000 money damages, representing just compensation as guaranteed by the Fifth Amendment, for SBA's regulatory taking of the petitioners' vested real property located in the State of Arizona. **Federal courts in prior litigation have adamantly held that this Arizona property was in fact taken by SBA in a proper manner as authorized by law** and have barred further litigation of this proper taking by the doctrine of *res judicata*;

however, **petitioners have NOT received any compensation for this governmental taking**. In this action, petitioners showed affirmative proof and substantial evidence that they have not received any compensation for this taking, concede to the validity of SBA's actions, and are not trying to change or modify prior final judgments. The **ultimate facts** of this controversy are:

(1) Petitioners have received **NO** compensation for the proper regulatory taking of the Arizona property, and

(2) Courts in prior litigation did not "actually determine" whether the petitioners were paid compensation for SBA's proper regulatory taking of the Arizona property (a question of fact) and whether the petitioners are constitutionally entitled to compensation for this governmental taking (a question of law).

As a significant aspect of this controversy, SBA has not only deprived the petitioners of their private property without just compensation, but SBA has also deprived them of **liberty and the pursuit of happiness**, because of the economical burdens imposed upon them by the deficiency judgment. Petitioners currently owe a huge $300,000 indebtedness to the federal government, which was **caused by SBA's failure to protect property rights of parties and failure to pay compensation for the Arizona property**. This debt, caused by SBA, has put them in "debtor's prison" with a bad credit rating and without the financial means to pay this debt. SBA has threatened to take away the minimal property assets left to pay on this debt, and has even threatened to take away their handicapped son's home. Petitioners cannot even acquire a home or business, because of a "fear" that government would confiscate it to pay on the debt. In other words, petitioners have been deprived of $800,000 worth of property assets, and now have to pay the

federal government a huge indebtedness which was caused by SBA's taking of the Arizona property without just compensation. This act of government is a gross injustice, has caused the petitioners to suffer an "injury-in-fact," and is contrary to the provisions of the Fifth Amendment..

Petitioners definitely have a "standing" under Article III of the Constitution to have this controversy heard and determined, because they will not be able to pursue a better way of life until the huge $300,000 indebtedness is paid or cleared by other means. If just compensation was to be paid for the Arizona property as a result of this cause of action, it would off-set the final deficiency judgment and bring about final closure of this case. **Petitioners are not seeking to change or modify prior final judgments**, but rather, this cause of action was filed for the sole purpose of seeking **ONLY** just compensation for the governmental taking of the Arizona property, which is a constitutional entitlement.

In this instant action, **petitioners made a demand for SBA to show proof and evidence that compensation was paid for the proper regulatory taking of the Arizona property**. In response to the petitioners' complaint, the United States did not dispute the plaintiffs' ultimate facts of this case, but rather made a collateral attack on the petitioners' complaint. Pursuant to local rules, RUSCFC Rule 12 (b)(4), defendant sought to dismiss the complaint because the plaintiffs failed to state a claim upon which relief may be granted, which was based primarily on prior application of the doctrine of *res judicata* to this case.

In reply to defendant's response, petitioners filed a motion for summary judgment because the United States did **NOT** dispute the ultimate facts of plaintiffs, and as a matter of law, as guaranteed by the Fifth Amendment, the United States

is constitutionally required to pay just compensation for the taking of the Arizona property.

Trial court agreed with defendant to dismiss the complaint for the plaintiffs' failure to state a claim upon which relief may be granted, and did not address the petitioners' motion for summary judgment. See Appendix B, p. 7. Petitioners assert that trial court erred, because the grounds upon which the petitioners sought relief is that the right to just compensation is a substantive right guaranteed by the Fifth Amendment. Secondly, the United States did not dispute the petitioners' ultimate facts. Trial court **ignored** the undisputed ultimate facts of the plaintiffs, and then made a false assumption that petitioners were compensated for Arizona property without proof.[1] See Appendix B, p. 6, footnote.

On appeal before the U.S. Court of Appeals for the Federal Circuit (herein "Federal Circuit"), both parties amplified points of law which apply to their argument. Petitioners argued on appeal that constitutional law, the substantive right to just compensation cannot be ignored, considered frivolous, and superseded by procedural law. In response, United States filed a motion for summary affirmance and sought dismissal based on the application of *res judicata*. Petitioners showed errors in fact and law made by trial court, but the Federal Circuit agreed with the United States and granted the motion for summary affirmance. **This judicial decision denied the petitioners of their substantive right to receive just compensation as guaranteed by the Fifth Amendment by applying the doctrine of *res judicata* to**

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[1] As to be explained herein, trial court made a gross error of fact, because: (1) acts of SBA forced the first lienholder to foreclose on his note, (2) trustee sale of Arizona property was by the first lienholder, not SBA, and (3) petitioners received **NO** compensation for this taking.

this controversy. See Appendix A. In other words, this appellate court held that the doctrine of *res judicata* is the law of this case, and as such, an alleged denial of substantive rights as guaranteed by the Constitution by the petitioners had no bearing on the outcome of this case. Or said differently, this appellate court held that procedural laws of the judicial process supersedes a person's substantive rights granted by the Bill of Rights.

In summary, **both the Court of Federal Claims and the Federal Circuit did NOT recognize the just compensation clause of the Fifth Amendment as sufficient grounds upon which relief may be granted**. Basically, federal courts ignore the just compensation clause and do not enforce this provision of the Constitution.

The doctrine of *res judicata* has been applied to this case based on SBA's judicial foreclosure of its loan during 1991-1994 before the United States District Court for the District of New Mexico (herein referred to as the "New Mexico district court"), case no. CIV 92-0157, so a **BRIEF BACKGROUND** of SBA's taking of the Arizona property without compensation is explained in paragraphs below.[2]

When SBA made its direct loan to petitioners in 1989, SBA held a deed of trust on the Arizona property as the government's secured interest. Fair market value of this property by an appraisal was $400,000. By Arizona law, SBA held a second lien position on this real property to secure its direct loan, whereby the first lienholder had a balance due on his note for about $110,000. Prior to SBA's direct loan, SBA

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[2] Petitioners have been seeking compensation for the taking of the Arizona property for nearly eight years, so there is a long history of this case. However, Petitioners will try to be as brief and concise as possible, outlining relevant facts of this controversy.

acknowledged in the loan authorization agreement that the government was to hold a second lien position on this property. Also, SBA was made aware of a "call" on the first note which was due and payable in July 1990. One of the conditions of the first lienholder's renewal and extension was the continued subordination by the SBA of its lien to that of the first lienholder, and SBA had agreed to subordinate to second position when the first lienholder rewrote his note. In July 1990, first lienholder agreed to refinance the first note for the same amount due, since petitioners were in good standing. However, when it came time for SBA to subordinate, SBA refused. This refusal forced the first lienholder to foreclose the first note at a Trustee Sale on October 26, 1990 where this Arizona property was purchased by the first lienholder for the sum of $108,523. By refusing to subordinate its lien, **SBA forfeited, vacated and gave away its secured interest**, which caused the petitioners to be divested of their Arizona property rights ***without*** compensation. This act of government was not necessary, because SBA had options to protect its interest, such as: 1) subordinate its lien, 2) sign the property back to petitioners to preserve their rights and income, or 3) write a new loan and pay off first lienholder in order to obtain first position. However, SBA chose to ignore these options, did nothing. As a result, SBA arbitrarily and negligently **destroyed** the petitioners' property rights, which were placed in the hands of SBA for care and safekeeping for SBA's benefit as well as the benefit of petitioners.

In 1991, a year later after the deprivation of the Arizona property without compensation, petitioners defaulted on the note held by SBA, and SBA non-judicially foreclosed on the Utah property. In 1992, SBA initiated action to judicially foreclose on the New Mexico property and for a deficiency judgment if proceeds from sale were not sufficient. On March 18, 1993, the New Mexico district court granted SBA a summary judgment to foreclose on the New Mexico

property. See Appendix I. In this original suit, petitioners sought compensation for the loss of the Arizona property by filing a counterclaim for breach of contract and fraudulent misrepresentation. The New Mexico district court specifically identified compensation for the loss of the Arizona property as a "contested issue of law" to be decided in its pre-trial order. This district court dismissed this counterclaim by ruling that the breach of contract claim was meritless and the fraudulent misrepresentation claim was dismissed for lack of jurisdiction. See Appendix I, p. 12-13. And, this court concluded that "SBA's alleged failure to subordinate its lien on the Arizona property does not create a genuine issue of material fact which can preclude summary judgment" to foreclose on the New Mexico property. See Appendix I, p. 8. Nevertheless, **this district court did not "necessarily and actually decide" whether the petitioners received compensation or are constitutionally entitled to receive compensation for the taking of the Arizona property,** because: 1) this district court lacked jurisdiction, 2) the Arizona property was not before this court to be foreclosed on, and 3) at the time of loan foreclosure, SBA had **NO** secured interest in Arizona property and petitioners did not own the Arizona property, since SBA gave away this property to a third party over a year prior to loan foreclosure proceedings.

In this original suit before the New Mexico district court, SBA repudiated the obligation of contract while loaning money, i.e. if there is no contract, there can be no breach of contract, and therefore, SBA is immune from suit by the doctrine of sovereign immunity. At Appendix I, p. 7, this district court mentions SBA's repudiation of a contract. Petitioners did not "foresee" this argument, because petitioners firmly believed that there was a legal, binding contract between parties after the loan was made since there

was a loan authorization agreement that was executed by placing liens on private property in exchange for the loan.

On appeal, Tenth Circuit affirmed the summary judgment to foreclose on the New Mexico property, but did not resolve compensation and contractual issues surrounding the Arizona property.

In 1994, the New Mexico district court granted SBA a deficiency judgment against the petitioners in the amount of $271,511.81, plus interest at the rate of 3.37% per annum from August 17, 1993 until paid. Credit had been applied to the loan balance for the Utah and New Mexico properties, but **NO** money damages or equitable relief was made for the taking of the Arizona property. **SBA's Certificate of Indebtedness is affirmative proof and substantial evidence that petitioners received NO compensation for this Arizona property**. See Appendix J, p. 6.[3]

On appeal of the deficiency judgment, Tenth Circuit affirmed this decision.[4] See Appendix H. The Order and Judgment applied *res judicata* to loan foreclosure proceedings, which included a bar on any "(6) claims

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[3] Petitioners were deprived of Arizona property on October 26, 1990, and this transcript of account reflects no credit to the loan balance on this date. The $45,000 credit was for the non-judicial foreclosure of the Utah real property, and other credits are payments on the loan balance. Subsequently, **NO** credit has been applied to loan balance for Arizona property, and SBA has shown **NO** proof or evidence before the courts that compensation was paid for the Arizona property, either in the form of money damages or equitable relief.

[4] SBA registered the deficiency judgment with the United States District Court for the District of Utah, so this prior action was an appeal of a decision by the Utah district court.

pertaining to the sales of the Arizona, New Mexico, and Utah real properties, the proceeds from which were credited to calculate the deficiency." See Appendices B, p. 6 and H, p. 3. The problem with this application of *res judicata* is twofold, i.e.

First, there was **NO** foreclosure sale of the Arizona property by SBA when foreclosing on its loan, since SBA gave away this property to a third party over a year prior to loan foreclosure. As such, at judicial foreclosure proceedings, SBA had **NO** interest in the Arizona property, and petitioners did not own this property since SBA gave it away. It is legally impossible for SBA to have conducted a foreclosure sale of the Arizona property, because, SBA had **NO** legal interest in this property during loan foreclosure proceedings.

Secondly, even if a foreclosure sale is accepted as the appropriate legal terminology for the taking of the Arizona property, **this Tenth Circuit appellate court did not "actually decide" whether the petitioners were compensated or are to be compensated for the Arizona property**. Also, there is no indication that this appellate court actually decided whether the petitioners were credited for the Arizona property when calculating the deficiency.

The end result of SBA's judicial foreclosure of its loan is that the petitioners were faced with Fifth Amendment violation, since they received NO compensation for the Arizona property and courts made NO provisions for just compensation to be paid for the taking of this property.

In seeking relief, petitioners decided to file a new law suit before the Court of Federal Claims who has subject-matter jurisdiction over constitutional matters, if the money damages sought exceeds $10,000. In the initial suit before

this claims court, case no. 96-242 C, petitioners sought just compensation for the taking of the Arizona property, and the Court of Federal Claims dismissed the complaint by deciding that contract issues were decided by the New Mexico district court in original suit. This claims court did not "actually decide" the substantive issue of just compensation for the Arizona property. This decision was affirmed by the Federal Circuit, case no. 96-5123.

Petitioners filed a second suit, a regulatory taking claim, before the Court of Federal Claims, case no. 97-426 L, to seek just compensation for the taking of the Arizona property, conceding that contract issues have been decided by a final judgment in prior litigation. This trial court decided that **the Arizona property was "included in the New Mexico district court's conclusion that foreclosure on plaintiffs' properties was proper."** See Appendix F, p. 3. However, this claims court again did not "actually decide" the substantive issue of just compensation. The Federal Circuit, case no. 97-5132, affirmed this decision, but did not decide the just compensation issue. See Appendix G.

As noted above, **courts in prior litigation have adamantly held that there was in fact a "proper" regulatory taking of the Arizona property** and that this issue is barred by *res judicata*, but the substantive issue of just compensation for this taking had not yet been decided, so petitioners filed this third instant action against the United States before the Court of Federal Claims. In this instant controversy, petitioners conceded to the validity of SBA's actions, are not trying to change or modify prior judgments, and filed this action to **ONLY** seek and recovery just compensation for the proper regulatory taking of the Arizona property, which is a substantive issue, a constitutional entitlement, that has **NOT** been actually decided by the federal courts in prior litigation.

REASONS FOR GRANTING THE PETITION

This Supreme Court made it very clear in ***Bell v. Hood***, 327 U.S. 678, 682 (1946), that:

> "Where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or law of the United States, the court must entertain the suit, except: (a) where the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous."

However, federal courts have treated the petitioners' right to just compensation as being a <u>frivolous</u> manner, have <u>ignored</u> the just compensation clause of the Fifth Amendment, and have dismissed petitioners' complaints based on procedural law. This avoidance of constitutional rights gives rise to many conflicts in the law between appellate courts and with many Supreme Court decisions.

The primary thrust of this Petition for a Writ of Certiorari to convince this Supreme Court that there is a <u>dire need</u> in this country for federal courts to <u>recognize</u> the right to just compensation as being a substantive right guaranteed by the Constitution. This recognition can only be done with a Supreme Court decision in this regard.

The failure of the federal courts to recognize a citizen's substantive right to receive just compensation for a governmental taking has **<u>dynamic, catastrophic impacts</u>** upon our Nation as a whole, because without enforcement of this constitutional provision, the federal government would have **<u>unlimited power</u>** to take private property without just compensation, and eventually private property rights would be swallowed up by police powers of government.

Our country was founded upon the basic principles of liberty and freedom. To reach this end, our forefathers who drafted and ratified our Constitution established property rights as the cornerstone of all other civil rights. The protection of rights in property lies at the heart of our constitutional system. Our founding fathers drew upon classical notions of legal rights and individual liberty dating back to the Justinian Code, Magna Carta, and the Two Treatises of John Locke – all of which recognize the importance of property ownership in a governmental system in which individual liberty is paramount. Property rights were made very clear in early Supreme Court decisions, such as:

> "[T]he right of acquiring and possessing property, and have it protected, is one of the **natural, inherent, and unalienable rights** of man. . . . No man could become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. . . . . [N]o man can be called upon to surrender or sacrifice his whole property, real or personal, for the good of the community. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation." [Emphasis added.] ***Vanhorne's Lessee v. Dorrence***, 2 U.S. (2 Dall) 304, 310 (1795).

> "[W]hen [property] is vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles, and renders it an holy thing. . . **The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable**. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. It is sacred; for, it is further declared, that **the legislature shall have no power to add to,**

alter, abolish, or infringe any part of, the constitution. The constitution is the origin and measure of legislative authority. . . Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and **the constitution eventually destroyed**." [Emphasis added.] *Id.* at 311-12.

"There are acts which the *Federal*, or *State*, Legislature cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican governments*, which will determine and **over-rule** an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*; or to take away that *security for personal liberty*, or *private property*, for **the protection whereof the government was establish**. . . . A law that punished a citizen for an *innocent* action, or, in others, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs the *lawful* private contracts of citizens; . . . or **a law that takes *property* from A. and gives it to B**: It is against all reason and justice for a people to entrust a Legislature with SUCH power; and therefore, it cannot be presumed that they have done it. The *genius*, the *nature*, and the *spirit*, of our State Governments, amount to a **prohibition** of *such acts of legislation*; and the *general principles of law and reason* **forbid** them." [Emphasis added.] *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

"That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. **The fundamental maxims of a free**

government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any expressions of the will of the people. **The people ought not to be presumed to part with rights** so vital to their security and well being, without very strong and direct expressions of such an intention." [Emphasis added.] ***Wilkinson v. Leland***, 27 U.S. (2 Pet) 627, 657 (1829). Also, see ***Terrett v. Taylor***, 13 U.S. (9 Cranch) 43, 50-51 (1815); ***Whitney Benefits, Inc. v. United States***, 18 Cl.Ct. 394, 399 (1989); ***Hage v. United States***, 35 Fed.Cl. 147, 168 (1996);.

This cause of action is an excellent example of how our Constitution is being destroyed. SBA gave away vested property rights of the petitioners to a third party, without paying compensation, and courts of law have totally avoided the Fifth Amendment and totally disregarded unalienable property rights. In other words, **SBA's acts as authorized by Congress took private "property from A. and gives it to B" without payment of any compensation to A., which is contrary to basic principles of free governments**, as stated in ***Calder v. Bull, supra*** and ***Vanhorne, supra***.

Ruby Ridge and Waco are well publicized alleged abuses of Power by the federal government, and these incidents are examples of how our "unalienable Rights" are being destroyed, and the People, as a whole, in this country are getting extremely upset with the exercise of such Power. This negative trend towards "life, liberty and property" in recent years can be clearly demonstrated in other aspects of

government, whereby government takes private property without just compensation. As a couple examples, city government takes a person's antique automobile without just compensation because it violated city ordinances—it wasn't currently licensed or hid from public view. A rancher or farmer loses use and enjoyment of his land without just compensation because of the Endangered Species Act. These citizens most often do not have the financial resources to hire an attorney to fight back in a court of law. It would cost them more to file a law suit, which they may not win, than to accept the loss and proceed on with their lives. Besides, today's courts sway towards supporting acts of government for public good, rather than to enforce property rights of the People. **Unchecked Power of big government is destroying substantive rights of the People**. Today, People, as a whole, have a "real" **distrust** towards government entities, and **government has lost its purpose**, as crafted by our forefathers, as being the protectors of property rights.

The right to just compensation is the primary constitutional protection that landowners have to keep arbitrary power of the federal government from interfering with "natural, inherent, and unalienable" property rights. The just compensation clause of the Fifth Amendment is so vital to personal liberty, because without enforcement, federal agencies would have unlimited power to take total control of private property, and **if government has unlimited Power over a person's property, there is NO liberty**.

To resolve today's social problems, politicians discuss and courts entertain suits about gun control, crimes, taxes, etc., but they ignore property rights, the basic principle upon which this country founded. There has to be **limits** placed on the Power of governmental authority to interfere with life, liberty and property, and **one of the constitutional limitations placed upon the federal government is the just**

compensation clause of the Fifth Amendment. See ***First Lutheran Church v. Los Angeles County***, 482 U.S. 304, 321-22 (1987). Peace and ordered liberty of the People can be achieved by the federal government, if, and **ONLY** if, property rights are held sacred, enforced and **protected**.

The just compensation clause of the Fifth Amendment doesn't preclude the government from taking private property for some public good. Our forefathers who wrote this supreme law of the land had the wisdom to recognize the need for government to have the legal right to take private property for public use, such as to build roads, schools, parks, dams, etc. for the public good as a whole. However, these acts of government are **NOT** to be done at the expense of destroying and depriving a person of his liberty and freedom. "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." ***Cleveland Bd. Of Educ. v. Loudermill***, 470 U.S. 532, 541 (1985). For private property, "adequate procedures," ***id.***, means that government is constitutionally required to pay just compensation to deprived owners when a taking occurs.

"The right to compensation secured by the Fifth Amendment is among the principal foundations of American liberty, and it is no less fundamental than the rights secured by the First Amendment or the other amendments of the Bill of Rights." ***Stearns Co., Ltd. v. United States***, 34 Fed.Cl. 264, 271 (1995). Also, see ***Hage v. U.S.***, ***supra***; ***Dolan v. City of Tigrad***, 512 U.S. 374, 392 (1994).

This Supreme Court held in ***Preseault v. ICC***, 494 U.S. 1,11 (1960), that the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." The

purpose of the just compensation clause, as interpreted by this Supreme Court in ***Armstrong v. United States***, 364 U.S. 40, 49 (1960), is "to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."

The right to just compensation is common law. It is common law that if property is taken from one person and given to another, compensation must be paid for the taking. As a analogy, if you take a loaf of bread from a grocery store, you must pay for it; otherwise, it is called stealing and you can go to jail for taking property without compensation. And, it would be unconscionable, shocking to the consciousness for it to be legally correct for the government to take private property for public use without paying for it. Common law requires payment for property taken.

This right to just compensation has been historically developed by this Supreme Court. One of the strongest and most powerful cases supporting the substantive right to just compensation was in ***Chicago B. & Q. R. Co. v. City of Chicago***, 166 U.S. 226, 236-37 (1897), in which Justice Harlan stated:

> "The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, **in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen**.' [cites omitted] . . . The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but **it is**

> **not due process of law if provision be not made for compensation. . . Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process recognizes the right of the owner to be compensated. . . The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."** [Emphasis added.]

This rule of law was repeated in ***Oregon R.R. & N. Co. v. Fairchild***, 224 U.S. 510, 524 (1912) and in ***Brand v. Union Elevated R.R.***, 238 U.S. 586, 597 (1915). Since 1915, this rule of law has had very little emphasis, except when there is a direct physical taking by eminent domain. However, this substantive law is starting to gain momentum in regulatory taking cases. In recent years, this Supreme Court has held that there is a per se taking of private property which requires the payment of compensation if the government action either (1) "does not substantially advance a legitimate state interest" or (2) "denies an owner economically viable use of his land." ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003, 1016 (1992); ***Keystone Bituminous Coal Assn. v. DeBenedictus***, 480 U.S. 470, 485 (1987); ***Nollan v. California Coastal Comm'n***, 483 U.S. 825, 834 (1987); ***Dolan v. City of Tigard***, ***supra*** at 385; ***Agins v. City of Tiburon***, 447 U.S. 255, 260 (1980).

Nevertheless, this instant controversy is not about what conditions constitutes a regulatory taking, but rather, the related **question of law** herein is whether the United States is constitutionally required to pay just compensation to the deprived owners, after federal courts decide that there was in fact a proper regulatory taking as authorized by law. As

stated in ***Chicago, supra***, "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." In this case, **SBA's judicial foreclosure proceedings of its loan concluded that the Arizona collateral was foreclosed properly by SBA as authorized by law, yet the petitioners received NO compensation for this proper taking**. According to ***Chicago, id.***, **this Arizona property was taken without due process of law.**

In the last 20 years or so, courts have repeatedly held that just compensation must be paid, if courts decide that there was in fact a proper regulatory taking, such as:

> "A taking occurs when government, acting within its statutory powers, infringes upon a party's property rights." ***Hage v. U.S., supra*** at 177.
>
> "[T]he federal constitutional question embraces not only a taking, but a taking on the payment of just compensation. A state judgment is **NOT FINAL** unless it covers both aspects of that integral problem." [Emphasis added.] ***San Diego Gas & Electric Co. v. San Diego***, 450 U.S. 621, 633 (1981); ***North Dakota Board of Pharm. v. Snyder's Drug Stores, Inc.***, 414 U.S. 156, 163 (1973).[5]
>
> "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation. . ." ***First Lutheran Church, supra*** at 321; ***Lucas, supra*** at 1030, n. 17; ***Tabb***

[5] This cause of action is not about a state judgment, but the Fifth Amendment applies to federal court decisions as well.

Lakes, Ltd. v. U.S., 10 F.3d 796, 799-800 (Fed. Cir. 1993).

"A landowner is entitled to bring an [inverse condemnation] action as a result of the self-executing character of the constitutional provision with respect to compensation." ***United States v. Clarke***, 445 U.S. 253, 257 (1980).

As evidenced by this case, most federal judges are avoiding this rule of law. Supreme Court's judicial guidance is desperately needed to **protect** landowners, because federal courts treat the right to just compensation as a **NON-ISSUE**. This avoidance of Fifth Amendment property rights is based in part on jurisdictional grounds, because neither the New Mexico district court in original suit nor the Court of Federal Claims accepted subject-matter jurisdiction to decide the substantive issue of just compensation for the Arizona property. See Appendices E; G, p. 4; and I, p. 12-13. Petitioners have been denied the substantive right to just compensation for **lack of jurisdiction**.

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for public use." ***Dolan***, ***supra*** at 385. This Supreme Court has held that "Congress cannot bar all remedies for enforcing federal constitutional rights." ***Bowen v. Michigan Academy of Family Physicians***, 476 U.S. 667, 681 n. 12 (1986). The exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of LIFE, LIBERTY, or PROPERTY

without due process of law or to take private property without just compensation.

By jurisdictional laws, the federal district courts and the Court of Federal Claims have concurrent jurisdiction over constitutional matters, whereby district courts are limited to money damages not exceeding $10,000. See 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). This dollar limitation is an important aspect to this case, because petitioners could have filed a new suit after SBA's judicial foreclosure of its loan before the Arizona district court, based on Arizona law, who has "in rem" jurisdiction over property that lies within the State of Arizona. Since the relief sought in this controversy is $400,000, the Court of Federal Claims has exclusive jurisdiction to hear and determine an inverse condemnation claim to recovery just compensation for a governmental taking. However, Federal Circuit does not agree, because the Court of Federal Claims cannot review decisions of other courts. See Appendices E and G, p. 4. This final decision conflicts with the following decisions of the courts:

> [The Court of Federal Claims] "is the only forum vested with jurisdiction to hear plaintiffs' Fifth Amendment taking claim and to deny plaintiffs a forum would violate their rights to due process of law." ***Hage v. U.S.***, ***supra*** at 160.

> "If the authorized action does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." ***Blanchette v. Connecticut General Insurance Corps.***, 419 U.S. 102, 126-27 (1974).

"When property owner seeks compensation for taking beyond scope of Government's condemnation action, proper remedy is Tucker Act: thus, when damages exceed $10,000, proper forum is Claims Court. For claims under $10,000, Little Tucker Act, 28 U.S.C. 1346(a)(2) (1988), provides concurrent jurisdiction in district courts. . . . The Supreme Court has often reaffirmed the 'well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation.' [cites omitted.] . . . **This distinction may require ajudication of a property owner's inverse condemnation claim at a different time and in a different court from the Government's condemnation action**." [Emphasis added.] ***Narramore v. U.S.***, 960 F.2d 1048, 1051 (Fed. Cir. 1992).

"Dismissal for lack of subject matter jurisdiction is without res judicata effect." ***Northeast Erectors Ass'n v. Secretary of Labor***, 62 F.3d 37, 39 (1th Cir. 1995); ***Nowak v. Ironworkers Local 6 Pension Fund***, 81 F.3d 1182, 1187 (2nd Cir. 1996); ***Aerolineas Argentinas v. U.S.***, 77 F.3d 1564, 1572 (Fed. Cir. 1996); ***18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure*** § 4436 (1981)(hereafter referred to as "18 C. Wright").

As noted above, courts have repeatedly held that the Court of Federal Claims under the Tucker Act has exclusive subject-matter jurisdiction to hear and determine Fifth Amendment taking claims; therefore, Federal Circuit erred, because **denial of jurisdiction by the Court of Federal Claims is a denial of due process of law**.

However, this controversy is a bit more complicated, because **petitioners have also been denied the substantive right to just compensation by the rules of the court,** RUSCFC Rule 12(b)(4), because petitioners "failed to state a claim upon which relief may be granted," and this Rule 12 was applied based on the doctrine of *res judicata*. See Appendices A, B and C. The **conflict in law** in this case is twofold: 1) procedural law supersedes substantive law, and 2) federal courts ignore legal rights when applying *res judicata*.

At trial court, the United States sought to dismiss this inverse condemnation claim, based on local Rule 12(b)(4), because petitioners failed to state a claim upon which relief may be granted. At Appendix B, p. 5, trial court states:

> "The court will dismiss plaintiffs' case for failure to state a claim upon which relief may be granted only if it appears beyond a doubt that plaintiffs have not alleged facts sufficient to support their claim. ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957); ***Mostowy v. United States***, 966 F.2d 668, 672 (Fed. Cir. 1992). In ruling on a motion to dismiss under RCFC 12(b)(4), the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiffs. ***Papasan v. Allain***, 478 U.S. 265, 283 (1986) . . .; ***Gould, Inc. v. United States***, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

When filing for dismissal, the United States did not dispute the ultimate facts of petitioners, and basically ignored the fact that private property was taken without just compensation. **Trial court violated its own discussion of the law**, because: 1) trial court did not accept the petitioners' undisputed facts as being true, and 2) dismissed the complaint without proof that compensation was paid for the Arizona property.

On appeal, the Federal Circuit affirmed the Court of Federal Claims' decision, treated this action as a frivolous case, dismissed this cause of action by summary affirmance, and cited ***Joshua v. U.S.***, 17 F.3d 378 (Fed. Cir. 1994) as the rule of law for summary disposition of cases. See Appendix A, p. 3. Basically what this appellate court is saying is that petitioners "did not identify any substantive right, founded upon either a money mandating statute or the Constitution, which might form the basis for [this] claim." ***Id.*** at 380. As such, **the Federal Circuit does not recognize the right to just compensation as being a substantive right, and basically ignored the just compensation clause of the Fifth Amendment.**

The above decisions of lower courts conflicts with federal statute 28 U.S.C. § 2072(b), i.e. **the rules of the courts "shall not abridge, enlarge or modify any substantive right."** This Supreme Court has already ruled on this point of law, in that courts cannot apply court's rules in such a manner that denies a person of his substantive rights. See ***Sibbach v. Wilson & Co.***, 312 U.S. 1, 10-11 (1941); ***United States v. Sherwood***, 312 U.S. 584, 590 (1941).

Even so, the application to RUSCFC Rule 12(b)(4) to this case has a much deeper legal meaning and consequences. **"[D]ismissal for failure to state a claim . . . rests on a determination that federal law does not create the right asserted."** [Emphasis added.] ***18 C. Wright § 4436, supra*** at p. 343. By applying Rule 12, the Court of Federal Claims and the Federal Circuit affirmed that **the right to just compensation is NOT a substantive right** upon which relief may be granted. This decision is unconscionable, and is in direct conflict with provisions of the Fifth Amendment.

The primary **conflict in law** in this case is substantive law verses procedural law, and to decide which law governs

this case, either the Fifth Amendment or *res judicata*, i.e.

> "The Fifth Amendment **guarantees** that private property shall not be taken for public use, without just compensation." ***Agins, supra*** at 260. "[T]he federal constitutional question embraces not only a taking, but a taking on the payment of just compensation. A state judgment is **not final** unless it covers both aspects of that integral problem." ***North Dakota, supra; San Diego, supra.*** [Emphasis added.]
>
> "A valid final judgment on merits is *res judicata* and is **absolute bar** to subsequent action between the same parties on the same cause of action. . . . [and] prior judgment is conclusive not only as to issues that were decided, but also as to issues that could have been raised." [Emphasis added.] ***Bunker Ramo Corp. v. United Business Forms, Inc.***, 713 F.2d 1272, 1277 (7th Cir. 1983).

The above words **"guarantees - not final"** and **"absolute bar"** are contradictory terms -- a conflict in the law. Petitioners argued that *res judicata* cannot bar a guaranteed substantive right that was not adjudicated in prior litigation, and in contrast, the United States argued that *res judicata* is an absolute bar, since it was applied in prior litigation and precludes relitigation of any and all issues, without exception. When two laws come into conflict, one or the other must govern the case. As stated in ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137, 176-78 (1803), substantive law must always supersede procedural law, whereby the Constitution is the supreme law of the land, the will of the People, and any law repugnant to the Constitution is null and void.

Res judicata has been applied to this case, based upon an one-sided determination of law, whereby the legal rights of

government has been decided, but courts have ignored the legal rights of landowners to receive just compensation. In taking cases, this Supreme Court has held that in order to have a valid "judgment on its merits" which bars further litigation requires a final decision on **BOTH** the governmental taking of private property, and the payment of just compensation. See ***Id. North Dakota; San Diego***. In other words, this rule of law requires that **the legal rights of deprived landowners must be actually determined before a case can be barred from further litigaton**. The legal rights of government and landowners are **NOT** the same, and the doctrine of *res judicata* does not apply to "unmixed questions of law." ***Montana v. United States***, 440 U.S. 147, 162 (1979); ***United States v. Moser***, 266 U.S. 236, 242 (1924); ***Burlington Northern R. v. Hyundai Merchant Marine***, 63 F.3d 1227, 1234 (3rd Cir. 1995). "[T]o be given preclusive effect, a judgment must be a final adjudication of the rights of the parties and must dispose of the litigation on the merits." ***In re Jenson***, 980 F.2d 1254, 1257 (9th Cir. 1992). Also, courts have frequently reminded us that "a judgment on its merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." See ***Fairmont Aluminum Co. v. Commissioner of Int. Rev.***, 222 F.2d 622, 625 (4th Cir. 1955); ***Harper Plastics v. Amoco Chemicals Corp.***, 657 F.2d 939, 943 (7th Cir. 1981). Moreover, in order to bar further litigation by *res judicata*, "the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." ***Cromwell v. County of Sac.***, 94 U.S. 351, 353 (1876); ***Southern Pacific Railr'd v. United States***, 168 U.S. 1, 50 (1897); ***Commissioner v. Sunnen***, 333 U.S. 591, 597-98 (1948).

Furthermore, "the doctrine of res judicata should not be applied inflexibly to deny justice." ***Smith v. Pittsburgh Gage & Supply Co.***, 464 F.2d 870, 874 (3rd Cir. 1972). By acts of SBA, petitioners have been denied the substantive right to just compensation, which has caused them to suffer an "injury-in-fact" by the deficiency judgment, which is a gross injustice and was not necessary if SBA would have protected the Arizona property rights.

CONCLUSION

There are definite conflicts in law in this controversy, especially between the substantive right of citizens to receive just compensation and the doctrine of *res judicata* as applied in this case. The Federal Circuit decided this case in a way which negates the United States Constitution and conflicts with many decisions of this Court and appellate courts.

This petition for a writ of certiorari should be granted, because federal courts ignore and avoid deprived landowners' substantive right to receive just compensation as guaranteed by the Fifth Amendment.

Respectfully Submitted,

Arthur R. Althoff, Party Pro Se

Julia A. Althoff, Party Pro Se

October 14, 1999

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

99-5031

ARTHUR R. ALTHOFF,

Plaintiff-Appellant,

and

JULIA A. ALTHOFF,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee

ON MOTION

Before CLEVENGER, RADER, AND BRYSON, Circuit Judges.

RADER, Circuit Judge.

ORDER

The United States moves for summary affirmance of the United States Court of Federal Claims' order dismissing Arthur R. Althoff and Julia A. Althoff's complaint. The Althoffs oppose. The United States moves, in the alternative, for an extension of time to file its brief, until 40 days after the court decides the motion for summary affirmance.

This is the third time the Althoffs have appealed from an order of the Court of Federal Claims dismissing their complaint as barred by res judicata or issue preclusion. In 1992, the United States, on behalf of the Small Business Administration (SBA), sued the Althoffs in the United States District Court for the District of New Mexico seeking a judicial foreclosure on the Althoffs' properties. The Althoffs filed a counterclaim, alleging breach of contract and fraudulent misrepresentation. The New Mexico district court granted judgment in favor of the United States and issued a deficiency judgment and judicial foreclosure. The United States Court of Appeals for the Tenth Circuit affirmed the judgment. The United States registered the deficiency judgment in the United States District Court for the District of Utah. 1994, the Althoffs filed for relief from the deficiency judgment in the Utah district court, which was denied. The Althoffs appealed the Utah district court's order, arguing that the New Mexico district court had erred in its resolution of their claims against the SBA. The Tenth Circuit affirmed the Utah district court's order and stated that the Althoffs' attempt to re-litigate the issues underlying the judgment entered by the New Mexico district court was barred by res judicata.

The Althoffs then filed a complaint in the Court of Federal Claims alleging a taking by the SBA of the New Mexico property and a violation of the Althoffs' due process rights. The claims court dismissed the complaint as barred by res judicata, and this court affirmed. See Althoff v. United States. No. 96-5123 (Fed. Cir. Mar. 20, 1997). On June 16, 1997, the Althoffs filed another complaint in the Court of Federal Claims that alleged that the SBA had engaged in a regulatory taking of the Althoffs' Arizona property without just compensation. The Court of Federal Claims dismissed the complaint as barred by res judicata and issue preclusion. This court affirmed. See Althoff v. United States, no. 97-5132 (Fed. Cir. Nov. 17, 1997) (order granting United States' motion for summary affirmance).

Turning to the present proceedings, on March 26, 1998, the Althoffs filed their third complaint in the Court of Federal Claims, alleging that they have never received compensation "for the 'taking' of [their] Arizona real property" and that they "have been denied 'due process of law' as guaranteed by the Fifth Amendment to the U.S. Constitution." The Court of Federal Claims dismissed the Althoffs' complaint as barred by res judicata and issue preclusion and stated:

> The Althoffs now seek to re-litigate, once again, the amount they claim is owed to them resulting from the sale of the Arizona property. The Tenth Circuit, however, specifically held that the Althoffs are precluded from re-litigating this precise issue. In addition, this court has, on two previous occasions, come to the same conclusion. These conclusions were affirmed by the Federal Circuit. Accordingly, the doctrine of res judicata precludes the Althoffs from re-litigating whether or not they were properly compensated as a result of the foreclosure on the Arizona property.

The Court of Federal Claims also stated that it lacked jurisdiction to entertain the Althoffs' Fifth Amendment due process claim. Finally, the trial court directed the Clerk not to accept for filing any new complaints from the Althoffs based on the claims previously dismissed. The Althoffs appealed.

The United States moves for summary affirmance. Summary affirmance of a case "is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) (summarily affirming the Court of Federal Claims' dismissal of a complaint). The United States argues that summary affirmance is appropriate because res judicata

clearly precludes the Althoffs from relitigating their claims. The Althoffs repeat the arguments presented in the trial court.

We agree with the reasoning of the Court of Federal Claims in dismissing the Althoffs' complaint. Thus, because no substantial question exists regarding the outcome of the instant appeal, the court summarily affirms the judgment of the Court of Federal Claims.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion for summary affirmance is granted.

(2) Each side shall bear their own cost.

FOR THE COURT

May 14, 1999
Date

s/ Randall R. Rader
Randall R. Rader
Circuit Judge

cc: Arthur R. Althoff
Julia A. Althoff
Gerald M. Alexander, Esq.

[seal] FILED
U.S. Court of Appeals
for the Federal Circuit
May 14, 1999
Jan Horbaly Clerk

s13

In the United States Court of Federal Claims

No. 98-203 C

(Filed September 23, 1998)

* * * * * * * * * * * * * * * * * * * *

ARTHUR R. ALTHOFF and JULIA A. ALTHOFF,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * * *

Arthur R. Althoff and ***Julia A. Althoff***, Moab, Utah, ***pro se*** plaintiffs.

Gerald M. Alexander, Department of Justice, Washington, D.C., with whom was ***Assistant Attorney General Frank W. Hunger***, for defendant. ***David M. Cohen***, Director, and ***Kirk T. Manhardt***, Assistant Director, of counsel.

OPINION

Futey, Judge

This case is presently before the court on defendant's motion to dismiss plaintiffs' *pro se* complaint for failure to state a claim upon which relief may be granted. Defendant maintains that the doctrines of *res judicata* and issue

preclusion bar the Althoffs from re-litigating issues previously decided, and affirmed, by numerous trial and appellate courts. The Althoffs counter that no court has actually decided whether they have been compensated for the taking which forms the basis of the instant suit.

Factual Background

The Althoffs received a loan from the Small Business Administration (defendant) in the amount of $270,000 in 1989 for the purpose of starting a ceramic pottery business in Utah. In conjunction with the loan to the Althoffs, defendant executed an Authorization and Loan Agreement (Authorization) which delineated the terms of the loan being disbursed to the Althoffs. Specifically, the Authorization required as collateral: (1) a first trust deed on commercial property in Utah; (2) a first mortgage lien on unimproved land in New Mexico; and (3) a security interest in, and assignment of proceeds from, a contract for sale of real property in Arizona. In February 1989, the parties changed the collateral with regard to the Arizona property to a second deed of trust on that property.

Pursuant to the terms of the loan, the Althoffs were required to make monthly payments in the amount of $2,920, commencing on April 22, 1989. Contrary to this requirement, the Althoffs made four payments for a total of $9,210, concluding on June 21, 1990. Therefore, since the Althoffs did not make timely monthly payments, defendant provided that the Althoffs with a notice of acceleration. Subsequent to this notice, the Althoffs defaulted on their loan.

Defendant non-judicially foreclosed on the property in Utah, and credited the Althoffs $45,000 as a result of a foreclosure auction on that property. Further, defendant filed suit in the United States District Court for the District of New Mexico to proceed with foreclosure on the property in New Mexico. In that case, the Althoffs argued, in part, the

"[defendant's] failure to subordinate its second deed of trust lien on the Arizona property caused [the Althoffs] to lose the property and sustain a $400,000.000 [sic] loss." ***United States v. Althoff***, No. 92-157, slip op. at 6 (D.N.M. Mar. 18, 1993). Despite the Althoffs' argument, the district court found in favor of defendant, and entered a deficiency judgment against the Althoffs for the amount of the defaulted loan, plus interest and costs. The decision of the district court was affirmed on appeal, and *certiorari* was denied by the United States Supreme Court. See ***United States v. Althoff***, 16 F.3d 417 (table) (10th Cir. 1993), *cert. denied*, 513 U.S. 836 (1994).

Despite the Tenth Circuit's affirmation of the New Mexico district court's conclusion, the Althoffs sought relief from the deficiency judgment issued by the New Mexico district court in the United States District Court for the District of Utah. On September 30, 1994, the Utah district court denied the relief sought by the Althoffs. The Althoffs appealed that decision to the United States Court of Appeals for the Tenth Circuit. In affirming the judgment of the Utah district court, the Tenth Circuit specifically held that the doctrine of *res judicata* barred the Althoffs from litigating "claims pertaining to the sales of the Arizona, New Mexico, and Utah real properties, the proceeds from which were credited to calculate the deficiency." ***United States v. Althoff***, No. 94-4231, slip op. at 3, (10th Cir. Jul. 24, 1995).

In 1996, the Althoffs filed suit in this court, alleging a taking of its property interest without just compensation under the Fifth Amendment. On May 6, 1996, Judge Hodges dismissed the Althoffs' complaint, finding that the issues raised were fully litigated in the district court. *See* ***Althoff v. United States***, No. 96-242C (Fed. Cl. May 6, 1996). The dismissal was affirmed by the United States Court of Appeals for the Federal Circuit. *See* ***Althoff v. United States***, No. 96-5123 (Fed. Cir. Mar. 20, 1997).

In June 1997, however, the Althoffs again filed suit in this court, alleging that defendant's actions constitute a regulatory taking of their Arizona property. Specifically, the Althoffs maintained that defendant's refusal to subordinate its position during the re-financing of the Althoffs' loan by a primary lien holder on the Arizona property caused the foreclosure and subsequent loss of that property. This court dismissed their complaint on July 1, 1997, finding that the issues presented in the Althoffs' complaint were fully litigated in the district court, and that both *res judicata* and issue preclusion prevent the re-litigation of these issues. *See* ***Althoff v. United States***, No. 97-426L (Fed. Cl. Jul. 1, 1997). The court's conclusions were affirmed by the Federal Circuit. ***Althoff v. United States***, No. 97-5132 (Fed. Cir. Nov. 17, 1997).

Nevertheless, the Althoffs, once again, filed suit in this court on March 26, 1998, alleging that, although defendant properly foreclosed on their property in Arizona, they have never been compensated "for the 'taking' of this Arizona real property."[1] In addition, the Althoffs allege they "have been denied 'due process of law' as guaranteed by the Fifth Amendment to the U.S. Constitution."[2] On July 10, 1998, defendant filed its motion to dismiss for failure to state a claim, arguing that the Althoffs cannot re-litigate issues previously decided on numerous prior occasions. The Althoffs filed a motion for summary judgment on August 3, 1998.[3]

Discussion

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1 Complaint (Compl.) at 2

2 Id. at 13.

3 The Althoffs did not file a separate opposition to defendant's motion to dismiss. The court considers the Althoffs' motion for summary judgment as their opposition to defendant's motion.

The court will dismiss plaintiffs' case for failure to state a claim upon which relief may be granted only if it appears beyond a doubt that plaintiffs have not alleged facts sufficient to support their claim. ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957); ***Mostowy v. United States***, 966 F.2d 668, 672 (Fed. Cir. 1992). In ruling on a motion to dismiss under RCFC 12(b)(4), the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiffs. ***Papasan v. Allain***, 478 U.S. 265, 283 (1986) (citing ***Scheuer***, 416 U.S. at 236); ***Gould, Inc. v. United States***, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Furthermore, all that is required to withstand a motion to dismiss "is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff[s'] claim is and the grounds upon which it rests." ***Conley***, 355 U.S. at 47 (footnote omitted).

Under the doctrine of *res judicata*, a final judgment made by a competent court on a cause of action precludes re-litigation between the same parties of matters actually litigated and decided. *See* ***Blonder-Tongue Lab., Inc. v. University of Ill. Found.***, 402 U.S. 313, 323-24 (1971). This rule extends to bind parties on any causes of action which should have been raised in the prior suit in addition to those actually litigated. ***Brown v. United States***, 3 Cl. Ct. 31, 41 (1983), *aff'd*, 741 F.2d 1374 (Fed. Cir. 1984). *Res judicata* precludes a plaintiff "from asserting the same transactional facts under a different cause of action." ***Bass v. United States***, 11 Cl. Ct. 295, 298 (1986).

In the present case, the Althoffs assert that defendant "foreclosed on th[e] Arizona property in a proper manner . . . without paying just compensation or making provisions for the Althoffs to be compensated in one form or another."[4]

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[4] Plaintiffs' Motion for Summary Judgment at 4. The record, however, indicates that on October 26, 1990, the

According to the Althoffs, no court has actually decided whether they are entitled to compensation for the loss of their Arizona property.

The New Mexico district court, however, found that defendant's "alleged failure to subordinate its lien on the Arizona property [did] not create a genuine issue of material fact which [precluded] summary judgment." ***Althoff***, No 92-157, slip op. at 8. With regard to this finding, the district court held that:

> no document executed between [the parties], and made part of the record, state either implicitly or explicitly that [defendant] would subordinate its lien on the Arizona property to a senior leinholder once the senior mortgage lien on this property matured and had to be paid or refinanced or that [defendant] had any legal duty to undertake such an obligation.

Id. at 9. Moreover, the Tenth Circuit, in affirming the conclusions of the Utah district court, held that:

> [a]pplying the doctrine of *res judicata* here, . . . any and all claims that were raised or could have been raised in the New Mexico federal district court proceedings are barred, including: . . . . (5) claims pertaining to [defendant's] failure to subrogate its lien on the Arizona real property; and (6) *claims pertaining to the sales of Arizona*, New Mexico, and Utah real *properties, the proceeds from which were credited to calculate the deficiency*.

Althoff, No. 94-4231, slip op. at 3 (emphasis added).

Arizona property was sold by Richard J. Rubin, as trustee, at a Trustee's Sale. The trustee's deed demonstrates the property was sold at a public auction to Mortgages, Ltd. for $108,523. *See* Compl., at Exhibit AE.

The Althoffs now seek to re-litigate, once again, the amount they claim is owed to them resulting from the sale of the Arizona property. The Tenth Circuit, however, specifically held that the Althoffs are precluded from re-litigating this precise issue. In addition, this court has, on two previous occasions, come to the same conclusion. These conclusions were affirmed by the Federal Circuit. Accordingly, the doctrine of *res judicata* precludes the Althoffs from re-litigating whether or not they were properly compensated as a result of the foreclosure on the Arizona property.[5]

Conclusion

For the above stated reasons, the court grants defendant's motion to dismiss the Althoffs' complaint for failure to state a claim upon which relief may be granted. Therefore, the court does not address the Althoffs' motion for summary judgment. The Clerk is directed to dismiss the Althoffs' complaint in its entirety. The clerk is further directed not to accept for filing any new complaints from the Althoffs based on the claims previously dismissed. No. costs.

s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

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[5] In addition, the court notes that it does not possess subject matter jurisdiction to entertain the Althoffs' Fifth Amendment due process claim. ***LeBanc v. United States***, 50 F.3d 1025, 1028 (Fed. Cir. 1995); ***see also Murray v. United States***, 817 F.2d 1580, 1583 (Fed. Cir. 1987) ("[a]lthough the Fifth Amendment's due process clause provides that no person shall be deprived of property without due process of law, no language in the clause itself requires the payment of money damages for its violation").

In the United States Court of Federal Claims

No. 98-203 C

[seal] FILED
SEP 23 1998
U.S. Court of
Federal Claims

ARTHUR R. ALTHOFF and JULIA A. ALTHOFF,

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion, filed September 23, 1998, granting defendant's motion to dismiss the Althoffs' complaint for failure to state a claim upon which relief may be granted,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Margaret M. Earnest
Acting Clerk of Court

September 23, 1998

By: s/ Lisa L. DeFade
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 9, 1999.

FOR THE COURT
s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: August 2, 1999

[seal] FILED
U.S. Court of Appeals
for the Federal Circuit
August 2, 1999
Jan Horbaly Clerk

cc: Arthur R. Althoff
Julia A. Althoff
Gerald M. Alexander, Esq.

ALTHOFF V US, 99-5031
(CFC - 98 - CV- 203)

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* NOTE: Pursuant to Fed. Cir. R. 47.6, this order is *
* not citable as precedent. It is a public order. *
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In the United States Court of Federal Claims

No. 98-203 C

(Filed October 22, 1998)

ARTHUR R. ALTHOFF and JULIA A. ALTHOFF, Plaintiffs, v. THE UNITED STATES, Defendant.	[seal] FILED OCT 22 1998 U.S. Court of Federal Claims

ORDER

This matter is before the court on plaintiffs' Motion for Reconsideration of this court's Opinion and Judgment of September 23, 1998 dismissing plaintiffs' Complaint under the doctrine of *res judicata*. The court has carefully considered plaintiffs' motion and finds that plaintiffs fail to allege any new issues not previously raised before the court.

While the court has some sympathy for the difficulties plaintiffs have encountered, it is without jurisdiction to deal with their particular complaint. Therefore, plaintiffs' Motion for Reconsideration is hereby DENIED.

IT IS SO ORDERED.

s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

In the United States Court of Federal Claims

No. 97-426L

(Filed July 1, 1997)

ARTHUR R. ALTHOFF and JULIA A. ALTHOFF, Plaintiffs, v. THE UNITED STATES, Defendant.	[seal] FILED JUL 1 1997

ORDER

This matter is before the court on plaintiffs' *pro se* complaint. Plaintiffs allege that the Small Business Association's (SBA) refusal to subordinate to second position during a refinancing of plaintiffs' loan by the primary lienholder caused a foreclosure on their property. The United States sued in the U.S. District Court for the District of New Mexico to enforce foreclosure on plaintiffs' properties in New Mexico, Arizona, and Utah.[1] Plaintiffs responded with a breach of contract claim. The district court issued a deficiency judgment and judicial foreclosure, holding that the SBA had

[1] Although the Althoffs were defendants in the district court proceedings, this court will refer to them as plaintiffs.

not acted improperly.[2] The decision was affirmed by the U.S. Court of Appeals for the Tenth Circuit. In 1996, plaintiffs filed suit in the U.S. Court of Federal Claims, alleging a taking by the SBA of their New Mexico property. The suit was dismissed as barred by *res judicata*. That dismissal was affirmed by the U.S. Court off Appeals for the Federal Circuit. In the present action, plaintiffs argue that the SBA's actions constitute a regulatory taking of their Arizona property, which must be compensated under the Fifth Amendment's Just Compensation Clause.

Plaintiffs' suit is barred by *res judicata*, as well as collateral estoppel. *Res judicata* precludes a suit from proceeding if a "prior suit resulted in a final judgment on the merits by a court of competent jurisdiction; was between the same parties or their privies; and was based on the same claim or cause of action." ***Beverly v. United States***, 24 Cl. Ct. 197, 200 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir.), *cert denied*, 506 U.S. 902 (1992). It is well-settled that a single claim may support a number of legal theories, all with corresponding relief. ***Narramore v. United States***, 30 Fed. Cl. 383, 387-88 (1994). Further, "'[c]laims are the same if they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court.'" ***Beverly***, 24 Cl. Ct. at 200-01 (quoting ***Johns-Manville Corp v. United States***, 855 F.2d 1556, 1567 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (alteration in original)).

Although plaintiffs did not raise a taking claim in the district court proceedings, their taking claim is based on the same operative facts involved in their prior breach of contract suit, as already determined by this court and affirmed by the

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[2] ***United States v. Althoff***, No. CIV 92-0157 (D.N.M. Mar. 18, 1993)

Federal Circuit.[3] The breach of contract issue was fully litigated in the district court. Moreover, the district court rendered a final judgment on the merits, holding that foreclosure was proper and plaintiffs did not raise any cognizable counterclaims. Therefore, the present claim, which is based on the same operative facts, is barred by res judicata. *See* ***id.***

In addition, the New Mexico, Arizona,[4] and Utah properties were included in the district court's conclusion that foreclosure on plaintiffs' properties was proper. The issue of the propriety of the foreclosure therefore has been decided. As such, collateral estoppel bars its reconsideration. The doctrine of collateral estoppel holds that once an issue has been "actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the litigation." ***Montana v. United States***, 440 U.S. 147, 153 (1997); *see also* ***Narramore***, 30 Fed. Cl at 387. For collateral estoppel to apply: (1) the issues before the court must be identical to those in the previous action; (2) they must have been raised and actually litigated; (3) determination of the issues was necessary and essential to the judgment; and (4) the party was fully represented in the previous suit. ***Martin v. United States***, 30 Fed. Cl. 542, 546, *aff'd*, 41 F.3d 1519 (Fed. Cir. 1994).

As demonstrated above, the issues before this court are identical to those considered by the district court. Further, plaintiffs raised the propriety of foreclosure on the Arizona property during the district court proceedings. Moreover, the district court addressed the Arizona property in its decision. Indeed, the district court's determination of the Arizona

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[3] ***Althoff v. United States***, No. 96-242C (Fed. Cl. May 6, 1996), *aff'd*, No. 96-5123 (Fed. Cir. Mar. 20 1997).

[4] *See* Plaintiff's Complaint at 6; ***Althoff***, No. CIV-92-0157, at 8.

property's status was necessary to the judgment because the judgment addressed the propriety of the foreclosures against plaintiffs' various properties. *See id.* at 549. Finally, plaintiffs were fully represented because they were the parties in the previous suit. *See id.* at 550. Thus, collateral estoppel bars this court from reconsidering plaintiff's claim.

Based on the foregoing reasons, plaintiffs' complaint is barred by *res judicata* and collateral estoppel. Therefore, the complaint is DISMISSED.

s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

97-5132

ARTHUR R. ALTHOFF,

Plaintiff-Appellant,

and

JULIA A. ALTHOFF,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee

ON MOTION

Before MICHEL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and CLEVENGER, Circuit Judge.

CLEVENGER, Circuit Judge.

ORDER

The United States moves for summary affirmance of the United States Court of Federal Claims' order dismissing Arthur R. Althoff and Julia A. Althoff's complaint. The Althoffs oppose. The United States moves, in the alternative, for an extension of time to file its brief. The Althoffs oppose.

BACKGROUND

This is the second time the Althoffs have appealed from an order of the Court of Federal Claims dismissing their complaint as barred by res judicata or collateral estoppel. In 1992, the United States, on behalf of the Small Business Administration (SBA), sued the Althoffs in the United States District Court for the District of New Mexico seeking a judicial foreclosure on the Althoffs' properties. The Althoffs filed a counterclaim, alleging breach of contract and fraudulent misrepresentation. The New Mexico district court granted judgment in favor of the United States and issued a deficiency judgment and judicial foreclosure. The United States Court of Appeals for the Tenth Circuit affirmed the judgment. The United States registered the deficiency judgment with the United States District Court for the District of Utah. In 1994, the Althoffs filed for relief from the deficiency judgment in the Utah district court, which was denied. The Althoffs appealed the Utah district court's order, arguing that the New Mexico district court had erred in its resolution of their claims against the SBA. The Tenth Circuit affirmed the Utah district court's order and stated that the Althoffs' attempt to relitigate the issues underlying their judgment entered by the New Mexico district court was barred by res judicata.

The Althoffs then filed a complaint in the Court of Federal Claims that alleged a taking by the SBA of the New Mexico property and a violation of the Althoffs' due process rights. The claims court dismissed the complaint as barred by res judicata. This court affirmed. See Althoff v. United States, no. 96-5123 (Fed. Cir. Mar. 20, 1997) (order granting United States' motion for summary affirmance).

Turning to the instant proceedings, on June 16, 1997, the Althoffs filed a complaint in the Court of Federal Claims that alleged the SBA had engaged in a regulatory taking of the Althoffs' Arizona property without just compensation. The

Court of Federal Claims dismissed the Althoffs' complaint as barred by res judicata and collateral estoppel. The claims court stated;

> Although plaintiffs did not raise a taking claim in the district court proceedings, their taking claim is based on the same operative facts involved in their prior breach of contract suit, as already determined by this court and affirmed by the Federal Circuit. The breach of contract issue was fully litigated in the district court. Moreover, the district court rendered a final judgment on the merits, holding that foreclosure was proper and plaintiffs did not raise any cognizable counterclaims. Therefore, the present claim, which is based on same operative facts is barred by res judicata.
>
> In addition, the New Mexico, Arizona, and Utah properties were included in the district court's conclusion that foreclosure on plaintiffs' properties was proper. The issue of the propriety of the foreclosure therefore has been decided. As such, collateral estoppel bars its reconsideration.

(Citations and footnotes omitted).

DISCUSSION

Summary disposition of a case "is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994). The United States argues that summary affirmance is appropriate because there is no substantial question concerning the outcome of this appeal. The Althoffs argue that the United States' motion for summary affirmance contains false and misleading statements of fact, the motion was interposed in order to defeat their claim to just compensation, and the merits of the appeal

should be decided on the basis of the arguments raised in the parties' briefs.

In this case, it is clear that summary disposition is warranted. We agree with the reasoning of the Court of Federal Claims in dismissing the Althoffs' complaint. To the extent that the Althoffs seek to challenge the rulings of the district courts and the Court of Appeals for the Tenth Circuit, the Court of Federal Claims does not have jurisdiction to review the decisions of district courts. See id. at 380. We conclude that the Court of Federal Claims' dismissal was clearly correct and that its order should be summarily affirmed.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion for summary affirmance is granted.

(2) The United States' motion for an extension of time to file its brief is moot.

(3) Each side shall bear their own cost.

FOR THE COURT

NOV 17 1997
Date

s/ Raymond C. Clevenger
Raymond C. Clevenger, III
Circuit Judge

cc: Arthur R. Althoff
Julia A. Althoff
Mark A. Melnick, Esq.

s11

[seal] FILED
U.S. Court of Appeals
for the Federal Circuit
NOV 17 1997
Jan Horbaly Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

[seal] FILED
United States Court of Appeals
Tenth Circuit
JUL 24 1995
PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	No. 94-4231
	)	(D.C. No. 94-CV-350)
ARTHUR R. ALTHOFF and	)	(D. Utah)
JULIA A. ALTHOFF,	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before MOORE, SETH, and EBEL, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

The sole issue for our consideration in this appeal is whether the district court abused its discretion in denying defendants' motion for relief from judgment filed pursuant to Fed. R. Civ. P. 60(b)(5) in the United States District Court for the District of Utah. Defendants' attempt to relitigate the issues underlying the judgments entered by the United States District Court for the District of New Mexico is barred by the doctrine of res judicata. We affirm.

Defendants received a loan from the Small Business Administration (SBA) for which they pledged collateral of personal property in Utah, and real property in New Mexico, Arizona, and Utah. The loan documents included a Loan Authorization stating that the SBA would disburse the loan amount, $270,000, within six months. In fact, the loan was disbursed in installments over the next several months. After defendants defaulted on the loan, the SBA applied to the New Mexico federal court for a partial summary judgment to foreclose its mortgage lien on the New Mexico property. The district court granted partial summary judgment, and this court affirmed on appeal, United States v. Althoff, No. 93-2114, 16 F.3d 417 (table) (10th Cir. 1993), cert. denied, 115 S. Ct. 116 (1994). The New Mexico federal court then entered a deficiency judgment for the amount of the defaulted loan, plus interest and costs, less credit for partial satisfaction.

Plaintiff then registered the deficiency judgment in the United States District Court for the District of Utah. Defendants moved for relief from the deficiency judgment, pursuant to Fed. R. Civ. P. 60(b)(5). The Utah court denied the motion, and defendants now appeal that denial.

Much of defendants' argument is directed at claimed errors in the New Mexico federal district court's orders. Although they recognize that claims lost or abandoned on appeal are barred, defendants maintain they are entitled to relitigate the New Mexico orders because (1) that court's conclusions of law are contrary to law and unconstitutional, (2) all of the facts relating to foreclosure of the Arizona property were not presented to the New Mexico court, and (3) all issues were not ruled on by the New Mexico district court or this court of appeals.

"Under the doctrine of res judicata, or 'claim preclusion,' a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Robinson v. Volkswagenwerk Ag, No. 93-5168, 1995, WL 325221, at *5 (10th Cir. May 30, 1995) (emphasis added); accord Allen v. McCurry, 449 U.S. 90, 94 (1980).

Applying the doctrine of res judicata here, we hold that any and all claims that were raised or could have been raised in the New Mexico federal district court proceedings are barred, including: (1) claims surrounding the Loan Authorization document or other loan documents; (2) whether the SBA discharged its obligations under 15 U.S.C. § 631; (3) claims that the SBA violated defendants' constitutional rights arising prior to the entry of the New Mexico federal district court's orders; (4) counterclaims against the SBA arising prior to the entry of the New Mexico federal district court's orders; (5) claims pertaining to the SBA's failure to subrogate its lien on the Arizona real property; and (6) claims pertaining to the sales of the Arizona, New Mexico, and Utah real properties, the proceeds from which were credited to calculate the deficiency.

We turn to the issue properly before us: Whether the Utah federal district court abused its discretion in denying defendant's motion for relief from judgment under Rule

60(b)(5). See Buchanan v. Sherrill, 51 F.3d 227, 230 (10th Cir. 1995) (we review denial of post-judgment relief under Rule 60 for abuse of discretion). "Rule 60(b) relief is only appropriate under extraordinary circumstances." Massengale v. Oklahoma Bd. Of Examiners in Optometry, 30 F.3d 1325, 1330 (10th Cir. 1994). Rule 60(b)(5) permits the court to relieve a party from a final judgment or order if "the judgment has been satisfied, released, or discharged, ... or it is no longer equitable that the judgment should have prospective application." Defendants claim they are entitled to relief under Rule 60(b) because (1) the SBA's acts constitute extraordinary circumstances requiring relief, and (2) the deficiency judgment is no longer equitable so should not have prospective application.

Defendants maintain the Utah judgment has prospective application because its enforcement will deprive them of future income. They also seek to protect all small businesses in America who might borrow from the SBA in the future.

To determine if a judgment has prospective application within the meaning of Rule 60((b)(5), we examine "whether it is 'executory' or involves 'the supervision of changing conduct or conditions[.]'" Twelve John Does v. District of Columbia, 841 F.2d 1133, 1139 (D.C. Cir. 1988) (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855); and United States v. Swift & Co., 286 U.S. 106, 114 (1932)). That an order requires future compliance does not necessarily bring it within the purview of Rule 60(b)(5). Twelve John Does, 841 F.2d at 1138. "The construction of the Rule sought by [defendants], 'which apparently is to the effect that a judgment has prospective effect so long as the parties are bound by it, would read the word "prospective" out of the rule.' We are not inclined to adopt such a construction." Maraziti v. Thorpe, 52 F.3d 252, 254 (9th Cir. 1995) (quoting Schwartz v. United States, 976

F.2d 213, 218 (4th Cir. 1992), cert. denied, 113 S. Ct. 1280 (1993)).

Furthermore, defendant cannot rely on possible future damage to other small businesses to meet the rule's prospective application requirement. "[A party] generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (quotation omitted). Accordingly, defendants have not shown entitlement to relief under the prospective application clause of Rule 60(b)(5).

We next address defendants' claim that the SBA's sale of the secured Utah personal property was not commercially reasonable, and therefore defendants did not receive adequate credit against their debt. See Rule (b)(5) (providing for relief if judgment has been satisfied). The Rule 60(b) motion on appeal here challenges the deficiency judgment originally entered by the New Mexico federal court, not the sale of the Utah personal property. Therefore, we do not address whether the sale was commercially unreasonable, or what the legal consequences of such a finding would be, see Cottam v. Heppner, 777 P.2d 468, 474 n.4 (Utah 1989) (noting that consequences of creditor's failure to meet statutory requirements in disposing of collateral have not been definitively settled in Utah). Rather, we consider whether defendants are entitled to relief from the deficiency judgment.

In reviewing an order denying a motion filed under Rule 60(b), "[w]e will reverse the district court's determination 'only if we find a complete absence of a reasonable basis and are certain that the district court's decision is wrong.'" Johnston v. Cigna Corp., 14 F.3d 486, 496-97 (10th Cir. 1993) (quoting Pelican Prod. Corp. v. Marino, 893 F.2d 1143, 1147 (10th Cir. 1990), cert. denied, 115 S. Ct. 1792 (1995). We have carefully considered

defendants' arguments and the evidence presented to the district court. We conclude the record supports the district court's decision to deny relief under Rule 60(b).

The judgment of the United States District Court for the District of Utah is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

[seal] F I L E D
UNITED STATES DISTRICT
COURT
ALBUQUERQUE, NEW MEXICO
MAR 18 1993
s/ Robert M March
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CIV 92-0157 JP/WWD

JULIA A. ALTHOFF and
ARTHUR R. ALTHOFF,

Defendants.

MEMORANDUM OPINION AND ORDER

The subject of this order is plaintiff's motion for partial summary judgment filed February 1, 1993 which requests the entry of summary judgment foreclosing the mortgage lien on real property described in the complaint. Having thoroughly considered the pleadings, facts and law I conclude that plaintiff's motion should be granted.

I. Background

Defendants executed and delivered a promissory note on January 20, 1989 in the sum of $270,000.000 payable to

the Small Business Administration (SBA).[1] Defendants obtained the loan for the stated purpose of acquiring real estate and commencing a ceramic pottery manufacturing business. Pursuant to the terms of the note defendants were required to make monthly payments of $2,920.00 beginning three months from the date of the note at an interest rate of 10% per annum.[2] To secure payment of note defendant Julia Althoff executed a mortgage in favor of plaintiff covering real property located in Catron County, New Mexico.[3] The mortgage was properly recorded on June 16, 1989.

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[1] Plaintiff United States of America has brought this action at the request of the SBA pursuant to 28 U.S.C. 1345, 28 U.S.C. 3001 et seq., and 15 U.S.C. 631 et seq.

[2] In its motion for summary judgment plaintiff listed the interest rate of 10.25%. However, in its reply to defendants' response which disputed the accuracy of this figure, plaintiff agreed that the interest rate is 10% and not 10.25%

[3] The mortgage establishes a first lien on real property described as:

> Lot Two (2), ESCUDILLA BONITA ACRES, UNIT I, according to the plat recorded in Cabinet A of maps, Slide No. 141-142, records of Catron County.
>
> Lot Fifteen (15), ESCUDILLA BONITA ACRES, UNIT I, according to the plat recorded in Cabinet A of Maps Slide No. 141-142, records of Catron County .
>
> Lot Twenty-six (26), ESCUDILLA BONITA ACRES, UNIT I, according to the plat recorded in Cabinet A of Maps Slide No. 141-142, records of Catron County.
>
> EXCEPT: 50 foot easement of each side of Coyote Creek which is reserved for use by owners and purchasers of ESCUDILLA BONITA ACRES, UNIT I, to drill wells of at least 100 feet depth for domestic uses and to provide water line easements to the existing utility easements.

In conjunction with the approval of defendants' loan application which was submitted on August 29, 1988, the SBA issued an Authorization and Loan Agreement executed by the SBA on September 28, 1988 and executed by the Althoff's on October 18, 1988. The Authorization set forth the terms upon which the SBA would make the loan to defendants. The Authorization required as collateral a first trust deed lien on commercial real estate located in Moab, Utah, a first mortgage lien on unimproved land located in Catron County, New Mexico (as described in footnote 3), a security interest in and assignment of proceeds from a real estate contract for property being sold by defendants to a third party in Maricopa County, Arizona[4] and a first security interest in all personal property including machinery, equipment, furniture, inventory, fixtures, accounts receivable, and general intangibles.

Defendants admit the authenticity of both the January 20, 1989 note and the June 16, 1989 mortgage.

The $270,000.000 of loan proceeds were disbursed to defendants in twelve installments, the last of which was 100% disbursed on February 16, 1990.

The first repayment installment of the note was due from defendants on April 20, 1989. Defendants made full payment of the first installment on April 22, 1989.[5]

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[4] When the purchasers under the real estate contract defaulted, the Authorization was amended in February 1989, at the request of defendants, to require defendants to give a second deed of trust lien on the Arizona property.

[5] In its motion for summary judgment plaintiff had neglected to credit this payment to defendants' account. In its reply to defendants' response which accurately pointed out the discrepancy, plaintiff presented documentation which shows that defendants' account now has been properly credited with this payment.

Defendants made three subsequent payments: August 21, 1989, $3,000.00; April 23, 1990, $2,290.00; June 21, 1990; $1,000.00. On July 6, 1989 the SBA approved deferment to maturity of the principal portions of the installments due in May, June and July 1989 and deferment of the interest portions until August 1989. Affidavit of John S. Gygi submitted in support of plaintiff's Reply to Response to Motion for Summary Judgment. Defendants failed to make further payments despite demand by plaintiff and plaintiff gave notice of acceleration as provided for in the note.

Following notice to defendants the lien on real property in Moab, Utah was foreclosed at a non-judicial sale on November 19, 1991. Affidavit of John S. Gygi submitted in support of plaintiff's motion for summary judgment. Plaintiff purchased the property at the foreclosure sale for $45,000.00 and intends to liquidate the property and apply any proceeds to defendants' account. Id. [6]

II. Legal Standard for Summary Judgment

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting

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Affidavit of John Gygi submitted in support of plaintiff's Reply to Response to Motion for Summary Judgment.

[6] In their response, defendants attempt to argue that "SBA took possession of the Utah property improperly, and that the defendants never had an opportunity to defend themselves in a Court of law", and that this allegedly wrongful action should preclude foreclosure of the mortgage lien on the Catron County property. I reject this argument as unfounded. Defendants received notice of the foreclosure sale at which the SBA obtained title to the Utah property. Although the SBA subsequently served defendants with notice to vacate the Moab property defendants refused and the SBA was forced to obtain an order from the United States District Court of Utah requiring defendants to vacate the property.

Fed. R. Civ. P. 1). A motion for summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, Harsha v. United States, 590 F.2d 884, 887 (10th Cir. 1979), the burden on the moving party may be discharged by demonstrating the absence of evidence to support the nonmoving party's case. Celotex, supra at 324. In such a situation, the moving party is entitled to judgment as a matter of law, "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 322. Summary judgment is warranted even when state of mind is at issue, when the party opposing the motion fails to make the requisite showing to defeat the motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

III. Discussion

Defendants do not dispute the authenticity of the note or the mortgage securing the note which plaintiff now seeks to foreclose in its motion for summary judgment. Nor do defendants dispute the fact that they have not made payments pursuant to the terms of the note. Rather, defendants argue that summary judgment is inappropriate because there are genuine issues of fact relating to why defendants failed to make payments and whether any monies are due and owing under the note. While defendants do indeed raise many factual issues in their response to plaintiff's motions, none of the issues raised by defendants are sufficient to defeat plaintiff's motion for summary judgment. Defendants "facts" simply do not raise genuine issues of material fact sufficient to preclude

the relief requested by plaintiff. Moreover, while defendants presented numerous exhibits in conjunction with their opposition to plaintiff's motion, the issues of fact defendants raise are for the most part conclusory allegations and their opposition to plaintiff's motion is not supported by a single affidavit. See Fed. R. Civ. P. 56(e).

Defendants raise three basic arguments in opposition to plaintiff's motion; that plaintiff's failure to disburse the entire loan proceeds within six months set forth in the Authorization amounted to a default by the SBA which relieved defendants of their obligations to make payment; that plaintiff's failure to subordinate its second deed of trust lien on the Arizona property caused defendants' to lose the property and sustain a $400,000.000 loss; and that in its dealings with defendants the SBA failed to follow its statutory "duty" to help small businesses.

A. The failure of the SBA to disburse the loan within six months cannot preclude summary judgment for plaintiffs.

The Authorization states that

> This Authorization is subject to: . . . .
>
> (b) No disbursement being made later than 6 months, from the date of this Authorization, unless such time is extended in writing.

Plaintiffs disbursed the loan in twelve installments, the last one on February 16, 1990. Defendants contend that the failure to disburse the funds within the six month period set out in the Authorization, which has been executed by defendants on October 18, 1988, amounts to a breach of plaintiff's contract with defendants. Plaintiff does not deny that it took longer than six months to disburse the loan funds. However, plaintiff argues that it was due to delays caused by defendants in

complying with agreed upon SBA loan requirements that disbursement surpassed the six month provision. Plaintiff also asserts that the Authorization is not a contract by the SBA, as both federal regulations and the Authorization itself clearly state that the Authorization "is not a contract to loan money." 13 C.F.R. § 122.5-5; Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment at 6-7.

I conclude that the failure of the SBA to disburse 100% of the loan proceeds within exactly six months does not create a genuine issue of material fact which can preclude summary judgment. The first eight installments were disbursed within six months of the Authorization and amounted to 85.3% of the total loan funds. 92.3% of the loan was disbursed within seven months of the Authorization and the full $270,000.00 within seventeen months of the Authorization. Given these facts, defendants' continued failure to make payments on the loan cannot be excused by the failure of the SBA to disburse 100% of the loan within the six months outlined in the Authorization. While defendants' claim of bad faith delay and claim that the "SBA has never, helped, acknowledged, or shown any evidence that would indicate an asserted effort that was made to expedite the disbursement of the loan" injects additional facts into the litigation, these facts are not material to plaintiff's request for summary judgment. Defendants acknowledge that they received 92.3% of the loan within seven months of the Authorization and that they eventually received the full amount of the loan. Defendants claim of too little too late is imply unavailing at this juncture.

Because I conclude that the failure of the SBA to disburse the loan within exactly six months does not create a genuine issue of material fact which can preclude summary judgment in this case, I find that it is irrelevant whether the delay was caused by defendants, plaintiff or a combination of both parties. Moreover, even if the Authorization could be construed as a contract, the alleged "breach" does not amount

to a material breach which can excuse defendants' repayment of their loan. In addition, I agree with plaintiff that the six month proviso appears to be written for the benefit of the SBA and not defendants. Affidavit of Karl Wernick (current SBA liquidation officer and former loan processor) submitted in support of plaintiff's Reply to Response to Motion for Summary Judgment (disbursement provision inserted to allow the SBA to rescind its authorization if the borrower has failed to go forward with the loan . . . not intended as deadline for the SBA to disburse loan proceeds).

B. The SBA's alleged failure to subordinate its lien on the Arizona property does not create a genuine issue of material fact which can preclude summary judgment.

Defendants make numerous conclusory allegations that the SBA actually owes them money as a result of bad faith actions which caused them to lose their Arizona property on which the SBA held a second deed of trust lien. Defendants contend that the SBA consented to subordinate its lien to that of another lienholder, but later withdrew consent. As a result, defendants contend that the "SBA caused a foreclosure sale of this property and for Defendants to lose $400,000.00, the market value of the property." Memorandum in Support of Defense Against the Plaintiff's Motion for Summary Judgment at 2. Defendants present two exhibits (Exhibit C and Exhibit AC) in support of their position. Neither exhibit supports their argument nor creates a genuine issue of material fact sufficient to preclude summary judgment. Rather, no documents executed between defendants and plaintiff, and made a part of the record, state either implicitly or explicitly that the SBA would subordinate its lien on the Arizona property to a senior lienholder once the senior mortgage lien on this property matured and had to be paid or refinanced or that the SBA had any legal duty to undertake such an obligation.

Defendants' Exhibit AC is a letter from Robert Curtis, Loan Specialist, of the SBA to defendant Arthur Althoff approving defendants' request to "change the Arizona real estate collateral for the above loan, from an assignment of the sales contract to a second trust deed on the property." This letter makes no mention of subordination upon refinancing of the senior lien and appears to represent the entire agreement between the parties regarding the amendment to the Authorization relative to the Arizona property.

Defendants' Exhibit C is a photocopy of a letter from Gregory M. Sir, Chief Executive Officer of Mortgage Ltd. to defendant Julia Althoff. The letter references an alleged "verbal agreement" made by the SBA to Mortgages Ltd.

> Per my conversation with the SBA, they did agree to Subordinate their lien position and stay second to our first position loan. This verbal agreement was subject to Mortgages Ltd. keeping their loan balance the same or less. But when our note/loan came up for renewal, the SBA refused to subordinate to our lien as originally agreed.
>
> Therefore, our note holder was forced to call the note all due and payable causing the property to be sold at foreclosure sale.

This exhibit cannot support defendants' allegations that the SBA somehow breached its agreement with defendants thereby excusing payment on the note and creating a genuine issue of material fact which would preclude summary judgment. First, the exhibit is not in a form I can properly consider as a document supporting an opposition to summary judgment. See Fed. R. Civ. P. 56(e). Second, even if I were to consider this exhibit, at most it illustrates an oral, gratuitous promise from SBA to Mortgages Ltd. As such it would be wholly unenforceable. Moreover, even if I considered it to be an enforceable contract, defendants would at most be third

party beneficiaries of any agreement made between the SBA and Mortgages Ltd. Finally, the letter makes no indication as to whether the condition precedent to the SBA's "verbal agreement" was even met - i.e. that Mortgages Ltd. kept its "loan balance the same or less" and defendants presented no evidence on this point.

Again, while defendants have certainly injected additional facts into the litigation by alleging that the SBA somehow backed out on a promise to a third party to subordinate its lien on the Arizona property, defendants have failed to create a genuine issue of material fact which would preclude summary judgment.

C. The SBA did not violate any statutory or regulatory mandate which can preclude summary judgment.

Defendants also argue that summary judgment is improper because, in their dealings with defendants, the SBA failed to abide by federal statutes and regulations which require the SBA to "aid, counsel, assist and protect small businesses." Memorandum in Support of Defense Against the Plaintiff's Motion for Summary Judgment at 3, 5. Defendants cite to 15 U.S.C. § 631 which states that:

> It is the declared policy of Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise . . . .

Defendants argument cannot serve as an obstacle to summary judgment. First, a "declaration" of Congressional policy is not a non-discretionary mandate to an agency. Moreover, Congress did not declare that the policy of the government should be to aid and assist small business at all costs and in all circumstances. Rather, as is only sensible, Congress declared

that Government should aid, counsel and assist "insofar as possible." This the SBA did.

The SBA loaned a lot of money to defendants in an effort to "assist" them in starting their business. In February of 1989 the SBA agreed at defendants' request, in an effort to "assist" defendants, to amend the Authorization and accept a second trust deed on the Arizona property in place of an assignment of the sales contract on the property. In July of 1989 the SBA approved deferment of both principal and interest on three installments in an effort to "assist" defendants in getting started in their business. While defendants claim that the SBA fail to heed their pleas for help, I find that the SBA more than complied with Congressional policy to aid and assist small business "insofar as possible."

Defendants also contend that summary judgment is inappropriate because the "SBA demanded monthly payments, including interest, on the full $270,000.00 as required by the note" before defendants had actually received the full amount of the loan. Memorandum in Support of Defense Against the Plaintiff's Motion for Summary Judgment at 1-2, 6. Defendants contention is completely unsupported by the record. Plaintiff has shown unequivocally that interest has accrued only on those amounts actually disbursed and the four payments which defendants actually made were applied against principal and interest due at the time of payment. Affidavit of John Gygi submitted in support of Reply to Response to Motion for Summary Judgment. The SBA's "demand" of payment was made properly pursuant to the loan agreement signed by defendants.

D. Defendants have failed to set forth a cognizable counterclaim against plaintiff.

While defendants' answer to plaintiff's complaint states that "the Defendants pray that the counterclaim be heard and that Defendants be awarded judgment against the

Plaintiff as set forth in their counterclaim" defendants' answer sets forth no clearly discernible counterclaims against plaintiff. Defendants also reference a cause of action against plaintiff in their response to plaintiff's motion for summary judgment stating that the "Defendants have a claim for monetary damages stemming from the SBA's breach of contract." Memorandum in Support of Defense Against the Plaintiff's Motion for Summary Judgment at 8-9. Defendants' response also alludes to a cause of action for misrepresentation. While I find that defendants have failed to sufficiently set forth the nature of their counterclaims and to properly invoke the jurisdiction of this court, even if defendants' answer and/or response could be read to set forth a counterclaim for breach of contract or misrepresentation, I find that plaintiff is entitled to sovereign immunity for any claim of misrepresentation and that defendants' claim of breach of contract is meritless.

The United States is immune from suit except as it consents to be sued and it is the terms of this consent which define my jurisdiction to entertain the suit. Ascot Dinner Theatre, Ltd. V. Small Business Administration, 887 F.2d 1024, 1027 (10th Cir. 1989). As an agency of the United States the SBA is afforded all immunities applicable to the United States. Small Business Administration v. McClellan, 364 U.S. 446, 448-50 (1960).

Because the SBA is immune from suit unless immunity has be explicitly waived, any tort claim defendants seek to bring against plaintiff must be brought pursuant to the Federal Tort Claims Act (FTCA) which waives immunity for certain specified torts. 28 U.S.C. § 2671 et seq. Defendants have failed to invoke the jurisdiction of this court under the FTCA. However, even if jurisdiction had been properly invoked the FTCA does not waive the immunity of the United States, and thus of the SBA, for torts based on misrepresentation or deceit. Since the only plausible tort defendants might possibly allege against plaintiff appears to

rest on allegations of misrepresentation and deceit, suit against the SBA is barred.

If defendants could be considered to have properly alleged a claim of breach of contract 15 U.S.C. § 634(b)(1) would permit suit against the Administrator of the SBA. However, as discussed above, defendants' allegations a breach of contract fall far short of stating a sufficient claim. Defendants claim that the SBA breached "contract terms" by failing to disburse all funds within six months must fail. As discussed above, I conclude that even if the six month proviso could be read to create some right in defendants, the SBA's admitted failure was not a material breach which can support defendants' nonperformance.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's motion for partial summary judgment is GRANTED.

2. The hearing on April 1, 1993 at 1:30 p.m. will be limited to determination of the principal balance due on the note and computation of the accrued interest.

s/ James A. Parker

UNITED STATES DISTRICT JUDGE

U. S. SMALL BUSINESS ADMINISTRATION

WASHINGTON, D.C. 20416

Date 03/30/93

To District Office
Portfolio Management Division
Attn: Ron Andazola

From Loan Accounting Branch
Washington, D.C.
Attn: Michael Donadieu

Subject Claypot Pottery
Ln #3306903005

The enclosed Certificate of Indebtedness, with Statement of Account and Transcript of Account, is furnished in compliance with our request dated 03/29/93.

s/ Ruby C. Mozzo , Supervisor
Loan Servicing Group

md

Enclosures

SMALL BUSINES ADMINISTRATION
CERTIFICATE OF INDEBTEDNESS

I, William C Turner, Acting Director, Office of Accounting Operations, Office of the Comptroller, Small Business Administration, do hereby certify as such officer that I have the authority to make this Certificate and that the financial records of said Small Business Administration are under my direct supervision and custody including the records which are maintained in connection with a loan to Claypot Pottery Ln #3306903005

Enclosed as Exhibit "A" is a Statement of Account and Transcript of Account relating to said loan, certified as true by Ruby C. Mozzo, Supervisor, Loan Accounting Branch, Small Business Administration. Said Statement of Account and Transcript of Account are true and correct to my personal knowledge and from my examination of the books and records of the Small Business Administration with respect to said loan, and are hereby incorporated with and made a part of this certificate.

Executed this 30th day of March 1993

s/ William C Turner

_____

William C Turner, Director

I, William A. George, Jr. a Notary Public in and for the District of Columbia do hereby certify that William C. Turner is the Director, Office off Accounting Operations, Office of the Comptroller, Small Business Administration, and that as such officer he has custody of the official financial records of the Small Business Administration

s/ William A. George, Jr.

_____

Notary Public

My commission expires: 04/30/94

SBA Form 897 (1-92) Previous editions obsolete

U. S. SMALL BUSINESS ADMINISTRATION

WASHINGTON, D.C. 20416

CERTIFIED STATEMENT OF ACCOUNT

As of 04/01/93
(Interest accrued on unpaid balance through above date)

Loan Number 3306903005 Name Claypot Pottery

Address 3280 S. Hwy 191
Moab, UT 84532

Total amount disbursed:		
Loan	$ 270000.00	
*Care and preservation of collateral	0.00	
*Recoverable expenses	3751.54	$ 273751.54
Less: Repayments		45492.64
Current balance		228258.90
Add: Accrued Interest		92116.58
Total charges outstanding		320375.48
Less: Escrow balance		0.00
TOTAL INDEBTEDNESS		$ 320375.48

Daily interest accrual on current balance . . . . . $ 62.54

Date of Last Transaction Interest Paid Through

02/06/92

Certified to be true and accurate statement as reflected by the official accounting records of the Small Business Administration

s/ Ruby C. Mozzo

Authorized Signature and Title
(Supervisor, Loan Servicing)

03/30/93
Date

*Balance as at January 1, 1965 and/or subsequent disbursements.

SBA FORM 596 B (8-81)

TRANSCRIPT OF ACCOUNT

[NOTE: this copy is not a complete transcript; however, it includes the columns below, but excludes others]

Transaction Date	Disbursement	Remittance	Principal Balance	Accrued Int. Balance
02/14/89	54500.00		54500.00	
02/14/89	18228.00		72728.00	
02/27/89	68742.00		141470.00	259.03
04/12/89	12330.75		53800.75	1964.42
04/17/89	21800.00		75600.75	2175.11
04/21/89	42697.10		218297.85	2367.55
04/22/89		2920.00	217805.21	0.00
05/01/89	12000.00		229805.21	537.05
06/05/89	18858.00		248663.21	2740.66
08/21/89		3000.00	248663.21	4986.43
12/12/89	14325.12		262988.33	2684.77
03/05/90	6519.03		269507.36	8665.00
4/23/90		2920.00	269507.36	9363.09
06/21/90		1000.00	269507.36	22719.51
11/01/90	200.00		269707.36	32539.92
11/27/90	550.00		270257.36	34461.12
04/16/91	600.00		270857.36	44827.16
11/19/91	ACQUIS. BLD	45000.00	225857.36	60930.19
12/16/91	2285.15		228142.51	62600.92
02/06/92	116.39		228258.90	65851.17
TOTALS	273751.54	54840.00	228258.90	65851.17

Authorized signature: s/ Ruby C. Mozzo Date: 3/30/93